No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol St NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

MICHAEL D. LEFFEL
SARAH A. SLACK
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703
(608) 257-5035
mleffel@foley.com
sslack@foley.com

JOSEPH W. JACQUOT
Counsel of Record
FOLEY & LARDNER LLP
One Independent Drive
Suite 1300
Jacksonville, FL 32202
(904) 359-2000
jjacquot@foley.com

LINDA E. BENFIELD
RICHARD G. STOLL
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400
lbenfield@foley.com
rstoll@foley.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE ARMY CORPS' JURISDICTIONAL DETERMINATIONS ARE FINAL AGENCY ACTIONS UNDER THE CLEAN WATER ACT THAT HAVE A SIGNIFICANT IMPACT ON STATE AND LOCAL GOVERNMENTS. 4

II. JURISDICTIONAL DETERMINATIONS SIGNIFICANTLY IMPACT AMICI'S RIGHTS AND OBLIGATIONS 8

A. Amici's Role As Landowners Is Impacted. 9

B. Amici's Role As Regulators Is Impacted. 10

C. Amici's Role As Partners With Local Businesses In Economic Development Is Impacted. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases:

Bennett v. *Spear*,
520 U.S. 154 (1997) 2, 4, 5, 8

Califano v. *Sanders*,
430 U.S. 99 (1977) 4

Fairbanks N. Star Borough v. *U.S. Army Corps of Eng'rs*,
543 F.3d 586 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009) 9

In re U.S. Envtl. Prot. Agency and U.S. Dep't of Def. Final Rule; "Clean Water Rule: Definitions of Waters of the United States," 80 Fed. Reg. 37,054 (Jun. 29, 2015), 803 F.3d 804 (6th Cir. 2015) 7-8

Rapanos v. *United States*,
547 U.S. 715 (2006) 6

Sackett v. *Envtl. Prot. Agency*,
132 S. Ct. 1367 (2012) 4

United Aerial Advert., Inc.,
2000 F.A.A. 575 (2000) 11

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C.
701 *et seq.* 4, 6, 10, 15
5 U.S.C. 704 ..... 4, 5, 6

Clean Water Act, Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*) 2-3
33 U.S.C. 1251(a) 5
33 U.S.C. 1251(b) 6
33 U.S.C. 1311(a) 5
33 U.S.C. 1342 5
33 U.S.C. 1344 5
33 U.S.C. 1344(d) 6
33 U.S.C. 1362(7) 5
2 C.F.R.:
Pt. 200.303(b) 11
33 C.F.R.:
Pt. 320–334 ..... 3, 6
Pt. 320:
Section 320.1(a)(6) 5, 6
Section 320.4 7
Pt. 325
Section 325.9 6
Pt. 331
Section 331.2 6

Miscellaneous:

80 Fed. Reg. (Jun. 29, 2015)
p. 37,054 7
p. 37,060-61 6
Matthew D. Chase, *Comments of the Nat'l Ass'n of Counties Re: Definition of "Waters of the United States" Under the Clean Water Act* 12 (Docket ID EPA-HQ-OW-2011-0880-15504) (Nov. 14, 2014), ... 11, 12

Michelle Jarobe, *As Cleveland-Area Ikea Plan Falters, Brooklyn Points to Army Corps Snarls*, CLEVELAND.COM (Feb. 17, 2016), *available at* *http://www.cleveland.com/business/index.ssf/2016/02/as_cleveland-area_ikea_plans_f.html* 13

Office of Mgmt. & Budget, *Aid to State and Local Governments* 265 (2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap_15_state_and_local.pdf 9, 10-11

State to File Amicus Brief in Support of Fairbanks North Star Borough, ALASKA DEP'T OF LAW (March 23, 2009), *available at* http://www.law.state.ak.us/press/releases/2009/032309-AmicuNSB.html 10

United States Dep't of Health & Human Servs., *Grants Policy Statement*, I-7 (2007) 11

United States Dep't of Trans. Fed. Transit Author., *Master Agreement* 2-3, 9-11 (2014); 11

U.S. Army Corps of Eng'rs Buffalo District, *Public Notice: IKEA Property, Inc. Application No. 2014-01023*, at 1-2 (Jul. 13, 2015), *available at* http://www.lrb.usace.army.mil/Portals/45/docs/regulatory/publicnotices/2015July/PN2014-01023OH.pdf 13, 14

STATEMENT OF INTEREST[1]

Amici curiae state and local government associations respectfully submit this amici curiae brief in support of respondents. Amici have a strong interest in federal agency action. That is particularly true when, as here, the agency actions concern environmental policy and economic development. They regularly submit amicus briefs to the Court in cases, like this one, that potentially have significant consequences for the Nation's state and local governments.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working

---

[1] The parties have consented to the filing of this *amicus curiae* brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the Amici made a monetary contribution to its preparation (Rule 37.6).

in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that jurisdictional determinations issued by the United States Army Corps of Engineers (Army Corps) are final agency actions subject to judicial review under this Court's test announced in *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997). The Army Corps' jurisdictional determinations are made pursuant to regulations promulgated under the Clean Water Act (the "CWA"). *See* Pub. L. No. 92-500, § 2, 86 Stat.

816 (33 U.S.C. 1251 *et seq.*); 33 C.F.R. 320-334. The Act provides important protections for the Nation's environment, and also recognizes and preserves the primary role of state and local governments in environmental protection and economic development. Thus, Amici, who frequently must promote both stewardship of the lands and economic development, are often impacted by these jurisdictional determinations.

Early judicial review of jurisdictional determinations by the Army Corps is important for the reasons stated by the Eighth Circuit and by respondents. *See* Pet. App. 11a-16a; Resp. Br. 39-50. Jurisdictional determinations under the Act have a real world significant impact on the "rights and obligations" of property owners and local regulators. Amici are uniquely positioned to explain the real world impact of regulatory action by the Army Corps and why prompt judicial review is necessary.

As landowners, Amici face the same timing and cost burdens suffered by respondents if a jurisdictional determination is not subject to prompt judicial review. As governmental entities, Amici also have to consider the cost of obtaining a permit that may not be necessary, in light of other demands on their budgets to provide necessary governmental services. As governmental entities, directed and empowered to provide long-term planning for communities, including economic development and capital infrastructure projects, Amici also need the certainty provided by prompt judicial review of jurisdictional determinations.

ARGUMENT

I. THE ARMY CORPS' JURISDICTIONAL DETERMINATIONS ARE FINAL AGENCY ACTIONS UNDER THE CLEAN WATER ACT THAT HAVE A SIGNIFICANT IMPACT ON STATE AND LOCAL GOVERNMENTS.

The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, provides for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. This Court has recognized that it was Congress's intent "that judicial review should be widely available to challenge the actions of federal administrative officials," *Califano* v. *Sanders*, 430 U.S. 99, 104 (1977), and that the APA "creates a presumption favoring judicial review of administrative action." *Sackett* v. *Envtl. Prot. Agency*, 132 S. Ct. 1367, 1373 (2012). Here, the Army Corps' jurisdictional determination meets the two-part test established by this Court in *Bennett* v. *Spear*: "[f]irst, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted).

The Eighth Circuit correctly held that the jurisdictional determination by the Army Corps was a final agency action that is subject to judicial review. Pet. App. 16a-17a. Applying the test this Court set forth in *Bennett*, the Eighth Circuit found that a jurisdictional determination is the consummation of the agency's decisionmaking process and is an action

from which rights or obligations have been determined, or from which legal consequences will flow. Pet. App. 9a-13a. The Eighth Circuit also correctly concluded that there is "'no other adequate [judicial remedy]'" by which a person or entity could contest such a determination. Pet. App. 13a-16a (quoting 5 U.S.C. 704).

Petitioner does not dispute that the decision is "'the consummation of the agency's decisionmaking process.'" Pet. Br. 25 (quoting *Bennett,* 520 U.S. at 177-78). Thus, there are two issues presently before the Court. First, the court must determine whether the jurisdictional determination is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (quoting *Bennett,* 520 U.S. at 178). Second, the Court must determine whether, absent judicial review, individuals or entities such as the respondents have another "adequate [judicial] remedy" by which they can contest a jurisdictional determination. *Id.* at 45 (quoting 5 U.S.C. 704).

The Army Corps' jurisdictional determination in this case was made pursuant to the Act's implementing regulations. *See* 33 C.F.R. 320.1(a)(6), 325.9, 331.2. The Act was enacted in its modern form in 1972 with the goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In order to obtain this goal, the Act includes broad limitations on the "discharges" of any "pollutant" into navigable waters without a permit. *See* 33 U.S.C. 1311(a), 1342, 1344. The Act definition of "navigable waters" is "the waters of the United States," 33 U.S.C. 1362(7), a broad definition that has led to much uncertainty as to the reach of federal

jurisdiction. *Rapanos* v. *United States*, 547 U.S. 715, 723-27 (2006); *see also Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054, 37,060-61 (Jun. 29, 2015). Discharges of pollutants include depositing fill, such as soil or other materials, into jurisdictional wetlands, including for purposes of filling those wetlands for development. *Rapanos*, 547 U.S. at 760-61 (Kennedy, J., concurring). This Court has noted that the average applicant for an individual permit "spends 788 days and $271,596 in completing the process." *Id.* at 721.

Amici strongly support the Act's goals of preserving and protecting our nation's wetland resources. Amici also strongly endorse the Act's equally important policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b).

Under the Act, the Army Corps is charged with administering permits for dredged or fill materials. *See* 33 U.S.C. 1344(d). The Army Corps has enacted regulations for its administration of these permits. *See* 33 C.F.R. 320–334. Under these regulations, the Army Corps adopted a rule that allows district engineers to issue "jurisdictional determinations" as to whether federal jurisdiction applies to a particular water or wetland. *See* 33 C.F.R. 320.1(a)(6), 325.9, 331.2. The agency's regulations further provide that a jurisdictional determination "shall constitute a Corps final agency action." 33 C.F.R. 320.1(a)(6). The APA provides for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. The Act's emphasis

on state involvement in environmental protection and development, combined with the uncertainty created by the reach of federal jurisdiction in this area, is of considerable significance to Amici. The Army Corps' determination that a property contains jurisdictional wetlands significantly impacts the Amici as landowners, as regulators under the Act, and as partners with private entities, significantly affecting their ability to fulfill their responsibilities to their citizens.

Depending upon whether a property is determined to contain jurisdictional waters under the Act, development may not be possible at all, or might be allowed only in a specific area and only with a permit, and even then, a permit often contains a requirement for significant investment in mitigation measures. *See, e.g.*, 33 C.F.R. 320.4; Resp. Br. 39-43. As noted above, the Act's permit process also takes significant time, and can cost hundreds of thousands of dollars.

The importance of these determinations is also reflected in the recent "Waters of the United States" rule promulgated by the United States Environmental Protection Agency to clarify the definition of "wetlands." *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (Jun. 29, 2015). Although the legality of this rule is not yet before this Court, the breadth of the rule, and the significant consequences that attend to a determination that a property contains a "wetland," highlight the importance of ensuring, early in the process, that a jurisdictional determination is correct.[2]

---

[2] The Sixth Circuit Court of Appeals has issued a stay of the rule

II. JURISDICTIONAL DETERMINATIONS SIGNIFICANTLY IMPACT AMICI'S RIGHTS AND OBLIGATIONS.

The Eighth Circuit correctly noted the significant impact an Army Corps' jurisdictional determination could have on respondents. Pet. App. 13a-17a. Indeed, jurisdictional determinations have substantial, practical effects, which lend credence to the Eighth Circuit's holding that these decisions establish legal rights and obligations and produce significant legal consequences. Pet. App. 11a-13a (quoting *Bennett*, 520 U.S. at 177-78). The practical impact of a jurisdictional determination likewise supports the Eighth Circuit's finding that, absent judicial review, parties such as respondents lack any other adequate judicial remedy by which they can contest such a determination. *Id.* at 13a-16a. The experience of Amici supports the Eighth Circuit's reasoning on both of these points.

As landowners and as governmental planning bodies, Amici need the certainty of prompt judicial review of a jurisdictional determination issued by the Army Corps in order to discharge their myriad obligations to manage limited public funds, protect wetlands, and plan for economic growth and development. As representatives of state and local governments, Amici serve a vital role in providing numerous community services to their citizens. These services may include planning, constructing, and maintaining state and local highways and roads,

---

pending its review, which is effective nationwide. *In re U.S. Envtl. Prot. Agency and U.S. Dep't of Def. Final Rule; "Clean Water Rule: Definitions of Waters of the United States," 80 Fed. Reg. 37,054 (Jun. 29, 2015)*, 803 F.3d 804 (6th Cir. 2015).

providing police and fire protection, establishing and maintaining parks and recreational areas for the enjoyment of their constituents, and planning and providing infrastructure for a variety of land use developments, that include industrial and commercial parks, as well as low-income housing. *See* Office of Mgmt. & Budget, *Aid to State and Local Governments* 265 (2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap_15_state_and_local.pdf [hereinafter "OMB 2015 Report"].

A. Amici's Role As Landowners Is Impacted.

As landowners of substantial amounts of real property, prompt judicial review of an Army Corps' jurisdictional determination for Amici is of vital importance. Otherwise, a local government may be forced to spend limited public funds to obtain an unnecessary permit, or may choose to abandon an otherwise worthy project.

These types of choices are precisely what confronted Fairbanks North Star Borough in Alaska (the "Borough"), which is a member of the *Amicus* NACo, after the Ninth Circuit Court of Appeals ruled that the Army Corps' jurisdictional determination was not subject to judicial review. *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs,* 543 F.3d 586, 597 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009). In that case, the Army Corps issued a final jurisdictional determination that all of the 2.1 acres of land the Borough intended to develop into playgrounds, athletic fields, restrooms, concessions, and related structures contained "waters of the United States." *Id.* at 589. The Borough unsuccessfully sought judicial review of the

jurisdictional determinations. The Ninth Circuit's holding that a jurisdictional determination is not a final agency action reviewable under the APA was identified by petitioner in the Petition in this case as one of the decisions creating a "three-way circuit split." *See* Pet. 12. Alaska Acting Attorney General Richard Svobodny explained why the state submitted an *amicus* brief in support of the Borough's petition for a writ of certiorari: "Property owners seeking to use their land cannot, in many instances, be sure of the land's wetland status and need a way to quickly and finally resolve that issue so that the time and money required to go through the permitting process are not unnecessarily wasted or do not become cause for the project to be abandoned." *State to File Amicus Brief in Support of Fairbanks North Star Borough*, ALASKA DEP'T OF LAW (March 23, 2009), *available at* http://www.law.state.ak.us/press/releases/2009/032309-AmicuNSB.html. Following this Court's denial of a petition, the Borough abandoned the project.

B. Amici's Role As Regulators Is Impacted.

The option of commencing a project and awaiting an enforcement action is "plainly an inadequate remedy." Pet. App. 14a. The Eighth Circuit noted the "substantial criminal monetary penalties and even imprisonment" that could be incurred from this strategy. *Id.* For Amici, as landowners, if they proceed with a project without obtaining a permit, they could face an additional potential penalty—the loss of federal grants, which are key sources of funding.[3] As a criterion for grant funding, a number

---

[3] *See* OMB 2015 Report. The OMB noted that "[f]ederal grants help State and local governments finance programs covering most areas of domestic public spending including infrastructure,

of federal agencies' grants require that applicants comply with all applicable federal laws. For example, the United States Department of Transportation, United States Department of Health and Human Services, and the Federal Aviation Administration condition some sources of funding to state and/or local governments on full compliance with the federal statutes and regulations. *See, e.g.*, United States Dep't of Trans. Fed. Transit Author. ("FTA"), *Master Agreement* 2-3, 9-11 (2014); United States Dep't of Health & Human Servs., *Grants Policy Statement*, I-7 (2007); 2 C.F.R. 200.303(b) (any "non-Federal entity must [c]omply with Federal statutes, regulations, and the terms and conditions of the Federal awards."); *United Aerial Advert., Inc.*, 2000 F.A.A. 575 (2000) (Federal Aviation Administration withheld federal funds from a county for violating federal laws related to grant assurances and grant conditions). Therefore, if they choose to proceed with a project without a permit, a state and/or local governmental entity may risk losing the very funds they need to complete the work.

Indeed, the specter of losing federal funding has a significant impact on the development of state and local infrastructure projects. One Midwest county received funding from the Federal Highway Authority to replace two old bridge structures. *See* Matthew D. Chase, *Comments of the Nat'l Ass'n of*

---

education, social services, and public safety." *Id.* at 266. The OMB concluded that in 2013, federal funds from both mandatory (through direct appropriations) and discretionary grants accounted for 29.8% of state budgets. *Id.* at 265. In 2014, OMB determined that the actual amount of federal grants to state and local governments was $577 billion. *See id.* at Table 15-1.

Counties Re: Definition of "Waters of the United States" Under the Clean Water Act 12 (Docket ID EPA-HQ-OW-2011-0880-15504) (Nov. 14, 2014), *available at* www.regulations.gov. The Army Corps determined that the project would impact three hundred feet of a roadside ditch that it considered to be jurisdictional wetlands. *Id.* Although the county disagreed with the Army Corps' determination, it nonetheless obtained a permit to avoid additional delay and the potential withdrawal of federal funding for the project. *Id.* The cost of the permitting process forced the county to reduce the scale of the project, and the final project was completed several months late. *Id.*

C. Amici's Role As Partners With Local Businesses In Economic Development Is Impacted.

Finally, Amici are required and empowered to provide short and long-term planning for their communities, which includes economic development and capital infrastructure projects, housing, recreation, and transportation planning. Their long-term growth plans are often implemented in partnership with private parties who develop projects within development zones, industrial parks, and targeted development areas. Amici can plan the strategy for growth, implement zoning restrictions to drive specific projects, plan for infrastructure improvements to support the growth, and issue necessary permits. However, the Army Corps could issue a positive jurisdictional determination that, if upheld, would preclude or interfere with the Amici's short and long-term development plans. All of the parties involved need the ability to seek prompt, definitive judicial review of that decision.

Faced with the alternatives of an expensive permit, a lengthy delay, or future enforcement action, private parties may decide to abandon these projects, depriving the communities of necessary investment and growth, and depriving the governments of the ability to responsibly manage their growth while protecting the definitive wetlands.

Recently, the potential designation of a portion of a property as a jurisdictional wetland forced a national retailer to abandon a planned development. Ikea, the Scandinavian furniture retailer, planned to construct an approximately 336,000 square-foot retail warehouse facility in the city of Brooklyn, Ohio. *See* U.S. Army Corps of Eng'rs Buffalo District, *Public Notice: IKEA Property, Inc. Application No. 2014-01023*, at 1-2 (Jul. 13, 2015), *available at* http://www.lrb.usace.army.mil/Portals/45/docs/regulatory/publicnotices/2015July/PN2014-01023OH.pdf. The planned development was going to be "more than a retail center" for this community. *See* Michelle Jarobe, *As Cleveland-Area Ikea Plan Falters, Brooklyn Points to Army Corps Snarls*, CLEVELAND.COM (Feb. 17, 2016), *available at http://www.cleveland.com/business/index.ssf/2016/02/as_cleveland-area_ikea_plans_f.html* (citations omitted). Local citizens expected the development to "'bring[] with it the ability to attract other investors who want to be around Ikea, itself. It's sort of like what McDonald's was 40 years ago. McDonald's went into a corner, and you saw three other people go into that corner.'" *Id.* (quoting Joe Roman, President and Chief Executive Officer of the Greater Cleveland Partnership). The Army Corps issued a preliminary jurisdictional determination for the eastern portion of the property, and conducted a site visit on the

western portion, concluding that there were approximately twenty-three acres of jurisdictional wetlands present between the two parcels. *See* U.S. Army Corps, *Public Notice: IKEA Property, Inc. Application No. 2014-01023, supra*, at 1-2. Ikea subsequently chose to terminate its efforts and agreements for the project, a decision which means a significant loss of opportunity for this community, including the loss of "'300-some jobs.'" *Id.* (quoting Andi Udris, Economic-Development Director in Brooklyn, Ohio). Situations such as this demonstrate the need for prompt judicial review of jurisdictional determinations, or local governments and businesses will be hindered in their ability to plan for and construct new development.

Similarly, when a large corporation plans to bring its corporate headquarters to a medium-sized city, much of state and local governments' work to prepare for this new development must be started, if not completed, well before the corporation opens its doors. A few thousand employees will relocate to this city. State and local governments must build roads, schools, parks, and sewer systems to be ready for the influx of workers. Expenses must be budgeted for and revenue must be raised. If state and local governments and investors have to wait to seek judicial review of a jurisdictional determination more is lost than just time as plans are postponed. Labor and materials costs may have increased, contractors may have moved onto other projects, federal funding and grants may no longer be available, interest rates may have increased, and budgeted tax dollars may have been spent on other projects. More importantly, the interested corporation may have moved on to another city, state, or even country.

In raising these examples, Amici take no position regarding the development of areas subject to federal jurisdiction, including the appropriate scope of that jurisdiction. Instead, these examples highlight that, absent prompt judicial review, a jurisdictional determination all too often becomes the final word on the scope of federal authority, increasing project costs, lengthening project timelines, and, in some instances, stifling community and economic development. Amici need the certainty provided by prompt judicial review of jurisdictional determinations to implement their planning mandates, and to facilitate and support community and economic development.

CONCLUSION

The Eighth Circuit Court of Appeals correctly held that jurisdictional determinations are final agency actions that are subject to judicial review under the APA. This allows state and local governments to manage limited budgets and effectively implement short and long-term growth and development planning strategies.

For the foregoing reasons, this Court should affirm the Eighth Circuit's decision.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol St NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

JOSEPH W JACQUOT
Counsel of Record
FOLEY & LARDNER LLP
One Independent Drive
Suite 1300
Jacksonville, FL 32202
(904) 359-2000
jjacquot@foley.com

MICHAEL D. LEFFEL
SARAH A. SLACK
FOLEY & LARDNER LLP
150 East Gilman Street
Madison, WI 53703
(608) 257-5035
mleffel@foley.com
sslack@foley.com

LINDA E. BENFIELD
RICHARD G. STOLL
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400
lbenfield@foley.com
rstoll@foley.com

March 2, 2016.